NO. 11952

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WAIALUA AGRICULTURAL COMPANY, LIMITED, a Corporation, *Appellant*,

v.

CIRACO MANEJA, ET AL., *Appellees*.

and

CIRACO MANEJA, ET AL., *Appellants*,

v.

WAIALUA AGRICULTURAL COMPANY, LIMITED, a Corporation, *Appellee*.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S BRIEF ANSWERING BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE.

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INDEX.

Page

ARGUMENT

I. Nothing in the Administrator's brief detracts from the application of the "agriculture" exemption in the Act to all employee appellees 3

A. The Administrator proposes untenable and impractical interpretations of the statutory definition of agriculture, and emphasizes irrelevant matters 3

B. The Administrator has misinterpreted the cases arising in Puerto Rico which involved the "agriculture" exemption in the Act 9

C. The wage determinations under the Sugar Act of 1937, relied upon by the Administrator, are irrelevant. If relevant, however, appellant's main line transportation employees are exempt from the Fair Labor Standards Act, since such wage determinations under the Sugar Act have been made with respect to them 15

D. The broad and sweeping exemptions granted by the Act to "agriculture" and the agricultural processing industries show clearly the legislative intent to exempt all of appellant's operations here involved 17

E. The interpretations as to the transportation of sugar cane announced in the Administrator's brief represent a clear departure from previous interpretations long followed by the Administrator and never publicly modified. Accordingly, and since the interpretations here advanced are in any event legally untenable, they are entitled to no weight 19

F. The Administrator's interpretation on main line transportation is inconsistent with his interpretation on the hauling of agricultural supplies, equipment and laborers to and from the fields. It is also inconsistent with his interpretations concerning many of the other important activities engaged in by appellant's employees 23

Page

II. Nothing in the Administrator's brief detracts from the application of the Sec. 7(c) exemption to all employee appellees who are engaged in the hauling of sugar cane from the fields to the mill, the processing of sugar cane into raw sugar, and their incidental and functionally necessary and indispensable operations 25

A. All such employees are engaged in the processing of sugar cane into raw sugar and work in the "place of employment" where the appellant is engaged in such processing..... 25

B. The Sec. 7(c) exemption applies to appellant's employees engaged in cane transportation..... 26

C. The cases cited by the Administrator do not support his presently asserted position on Sec. 7(c) 28

D. The Sec. 7(c) exemption applies to the appellant's service shop employees..... 29

E. The Sec. 7(c) exemption is not lost when work is performed while the mill is shut down for the annual period of repair and reconditioning 31

III. The Administrator's brief does not detract from appellant's contention that any employee appellee, who in a workweek performs some work exempt under Section 13(a)(6) or Section 7(c) and does not engage for any substantial part of his time in the same workweek in an activity which is not so exempt, is exempt for that workweek from the overtime provisions of the Act..... 33

APPENDIX

A. Methods of cane transportation on Hawaiian plantations 37

B. Administrator's release, transcript of proceedings of Industry Committee for Sugar and Related Products Industry, and opinion letters of Wage and Hour Division dealing with application of Sec. 13(a)(6) to cane transportation 37

CITATIONS.

Cases: Page

Addison v. Holly Hill Fruit Products, 322 U. S. 607 19
Anderson v. Manhattan Lighterage Corp., 148 F. (2d) 971 35
Bay Ridge Co. v. Aaron, 334 U. S. 446 2
Bowie v. Claiborne, 1 Labor Cases ¶18,443 .....10, 24
Bowie v. Gonzalez, 117 F. (2d) 11 .....10, 20, 24, 26, 32
Calaf v. Gonzalez, 127 F. (2d) 934 ....10, 12, 15, 20, 21, 27
Damutz v. Pinchbeck, 158 F. (2d) 882 16
Davis v. Goodman Lumber Co., 133 F. (2d) 52 34
Fleming v. Swift, 41 F. Supp. 825 29
Jewell Ridge Coal Corp. v. U.M.W.A., 325 U. S. 161 .. 2
Larson v. Ives Dairy Co., 154 F. (2d) 701 7
Maisonet v. Central Coloso, 6 Labor Cases ¶61,337 .. 31
Miller Hatcheries v. Boyer, 131 F. (2d) 283 2
N.L.R.B. v. Campbell, 159 F. (2d) 184 6
North Shore Corp. v. Barnett, 143 F. (2d) 172 35
Skidmore v. Swift, 323 U. S. 134 2
10 E. 40th St. Bldg., Inc. v. Callus, 325 U. S. 578 6
U. S. v. American Trucking Associations, Inc., 310 U. S. 534 2
Vives v. Serralles, 145 F. (2d) 552 .....13, 15
Walling v. Bridgeman-Russell, 6 Labor Cases ¶61,422 28
Walling v. Halliburton Co., 331 U. S. 17 2
Walling v. Swift, 131 F. (2d) 249 32

Statutes:

Sugar Act of 1937, 50 Stat. 903; 7 U. S. C. Sec. 1100.15, 17
Sugar Act of 1948, 61 Stat. 929; 7 U. S. C. Sec. 1100.. 17

Miscellaneous:

Agricultural Statistics, U. S. Department of Agriculture, 1947 32
Bulletin No. 926, U. S. Department of Labor 11, 32, 37
Code of Federal Regulations, Title 7, Ch. VIII, Part 802:
Sec. 802.30 (2 F. R. 2108) 14
Sec. 802.34d (6 F. R. 611) 16
Sec. 802.34e (7 F. R. 3053) 16
Sec. 802.34f (8 F. R. 8780) 16
Sec. 802.34g (9 F. R. 869) 16
Determination of a Farm, etc. for the Territory of Hawaii made by the Secretary of Agriculture under the Sugar Act of 1937 14
Hearings on S. 1349, 79th Cong., 1st Sess. 5

Page

Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943.....21, 38
Interpretative Bulletin No. 14, of Administrator, Wage and Hour Division, U. S. Department of Labor.....3, 5, 6, 14, 18, 20, 21, 22, 23
Letter of October 9, 1946 from the Deputy Administrator to Mr. James Marshall, Director of the Sugar Branch, Production and Marketing Administration, U. S. Department of Agriculture 9, 20, 22, 46
Letter from Mr. Paul Guillot, Paincourtville, La., to the Wage and Hour Division, U. S. Department of Labor, dated September 29, 1942.....21, 42
Letter from William B. Grogan, acting for the Administrator, to Mr. Paul Guillot, Paincourtville, Louisiana, dated November 26, 1942.....20, 28, 43
Release G-322, May 20, 1943, of Administrator, Wage and Hour Division.....20, 21, 22, 37
Release R-1892, January, 1943, issued by the Administrator, Wage and Hour Division.....27, 29, 30
13 F. R. 212..... 16
Webster's New International Dictionary, Second Edition, 1945..... 14

1944-45 W. H. Man:
p. 566..... 18
pp. 592-593..... 3
p. 609..... 28
pp. 643-644..... 32
p. 1520..... 32

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Pursuant to leave of Court, appellant respectfully submits this answer to the brief of the Administrator of the Wage and Hour Division, United States Department of Labor (hereinafter referred to as the Administrator), as *amicus curiae.*

The Administrator's views must be evaluated in the light of certain settled principles. "As no authority was given any agency to establish regulations, courts must apply the statute to this situation without the benefit of binding interpretations within the scope of the Act by an administrative agency". *Bay Ridge Co.* v. *Aaron,* 334 U. S. 446, 461. The Administrator's views will be rejected if "legally untenable". *Jewell Ridge Coal Corp.* v. *U.M.W.A.,* 325 U. S. 161, 169. The weight to be given his interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control". *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 140. Such interpretations are persuasive, for example, where they represent the "contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new". *United States* v. *American Trucking Associations, Inc.,* 310 U. S. 534, 548. See also *Miller Hatcheries* v. *Boyer,* 131 F. (2d) 283 (C.C.A. 8), declining to overturn a long established administrative interpretation under the Act, and emphasizing that such interpretation was the Administrator's initial interpretation made soon after the Act went into effect and that it had been consistently followed; *Walling* v. *Halliburton Co.,* 331 U. S. 17, 25-26, declining to depart from a decision rendered under the Act five years before, and pointing out that employers had regulated their affairs on the faith of the earlier decision.

I.

Nothing in the Administrator's Brief Detracts From the Application of the "Agriculture" Exemption in the Act to All Employee Appellees.

A. The Administrator proposes untenable and impractical interpretations of the statutory definition of agriculture, and emphasizes irrelevant matters.

1. Our reply brief (pp. 5-6) has already shown the fallacy of the Administrator's statement (Br. p. 8) that appellant's processing mill is really the dominant element in its operations. Moreover, this argument of the Administrator, in which he places emphasis upon the object and purpose of an employer's operations in construing the phrase "incident to" in Section 3(f), represents a departure from his published interpretations of the meaning of that phrase.

An opinion rendered by the Administrator's attorneys, and consistently followed by the Administrator, stated that in determining whether practices are "incident to" farming operations, the tests to be considered are the following: (a) the number of employees working in the incidental practice as contrasted with the number working on the farm; (b) the number of man hours worked in the incidental practice as compared with the number worked on the farm; (c) the amount of the payroll for the incidental practice as compared with the amount of the farm payroll; (d) the extent if any to which the employees are interchanged between the incidental practice and farm work; and (e) the investment that the employer has in the incidental practice as compared with the investment in the farm. *1944-45 WHMan.*, pp. 592-593. See also ¶ 10, Interpretative Bulletin No. 14. These tests are satisfied here. Appellant's Br. pp. 25, 26-28 (particularly footnote 18 on p. 28).

2. The Administrator's contention (Br. p. 8) that appellant's business is a hybrid type, which has assumed the functions of manufacturer, carrier and farmer, betrays an acute lack of understanding of the usual farming opera-

tions of farmers in the United States, its Territories and possessions.

The particular activities in which appellant is engaged as shown by the stipulated facts (R. 129 et seq.) are the following: (i) Preparation of the soil; (ii) Construction of irrigation ditches, flumes, etc.; (iii) Hauling of supplies and laborers to and from the cane fields; (iv) Hauling of supplies from Honolulu to the plantation; (v) Planting; (vi) Ratooning; (vii) Cultivating; (viii) Weeding; (ix) Spraying herbicides and insecticides; (x) Fertilizing; (xi) Irrigating; (xii) Feeding and shoeing horses and mules; (xiii) Cutting of the cane; (xiv) Loading of the cane into narrow gauge railroad cars; (xv) Hauling of the cane to the mill; (xvi) Cleaning of the cane; (xvii) Preparing the perishable cane for market by processing it into raw sugar and molasses; (xviii) Loading raw sugar and molasses into rail cars for shipment; (xix) Repair of field machinery; (xx) Repair of hauling facilities; (xxi) Repair of processing machinery; (xxii) Storage of fertilizer, field machinery, herbicides, insecticides and other farm supplies; and (xxiii) Maintenance of records and performance of necessary clerical work.

Each and every one of these activities is functionally identical with the activities conducted by untold numbers of farmers. See Brief of American Farm Bureau Federation, *amicus curiae,* pp. 2-3, 6-8.

Thus it is misleading to designate appellant as a "carrier" and a "manufacturer", in addition to a farmer. Every farmer, as we have just shown, is a "carrier" in the sense that he transports and hauls his products from the fields to storage, to market, to a processor or to a carrier for transportation to market. The statutory definition plainly contemplates the farmer as a carrier in this sense, for it includes among the exempt practices of a farmer "delivery to storage or to market or to carriers for transportation to market". If he delivers, he transports or carries. And the legislative history of the exemption reviewed in our main brief (pp. 36, 84-86) repeatedly emphasizes the Congressional intent to exempt "all kinds of labor performed on a farm and all kinds of labor in connection with

delivering agricultural products to market'' [Emphasis supplied]. Every farmer also is a carrier in the sense that he transports from one part of the farm to another agricultural supplies and agricultural equipment and in the further sense that he sends his trucks to a nearby town and hauls back necessary farm supplies and equipment. The Administrator himself in his Interpretative Bulletin No. 14 has recognized that these various ''carrier'' activities may be performed by a farmer and constitute part of farming. See ¶¶ 10(c), (d), (e) and (f) of the Bulletin.

Furthermore, every farmer is a ''manufacturer'' to the extent to which he transforms the product he grows into marketable condition. Many fruit and vegetable farmers pack and can their own fruits and vegetables; many cotton farmers gin their own cotton; and many dairy farmers process their own milk into butter and cheese. All of this is done preparatory to marketing. Brief of American Farm Bureau Federation, p. 7. Such a farmer is as much a farmer within the statute as a farmer who does less. The statute of course does not reduce ''farmer'' to the lowest common denominator of farming. The statutory definition of ''agriculture'' plainly contemplates the farmer as a ''manufacturer'' in this sense, for it includes, among the exempt practices of a farmer, ''preparation for market''. The legislative history of the exemption, reviewed in our main brief (pp. 34-36, 85), clearly reveals the Congressional purpose to exempt all work done on a farm ''so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop.'' And the Administrator himself has recognized that a farmer is a ''manufacturer'' in this sense, for he has pointed out that the agricultural exemption may extend to the following operations among others when performed by a farmer: canning and packing fresh fruits and vegetables, canning and packing dairy products, ginning cotton, stemming tobacco and drying furs. Interpretative Bulletin No. 14, ¶ 10(b).[1]

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[1] See also the testimony of Administrator Walling before the Senate Committee on Education and Labor on S. 1349, 79th Cong., 1st Sess., page 236:

That all of the activities listed on p. 4, *supra,* are in fact commonplace, everyday activities of farmers, and exempt under Section 13(a)(6), is well illustrated by the case of *N.L.R.B.* v. *Campbell,* 159 F. (2d) 184 (C.C.A. 5). There, it was held that employees engaged in packing and preparing for market tomatoes grown by their employer on his farm were "agricultural laborers" within the meaning of the National Labor Relations Act and hence excluded from that Act's scope, which is much broader than the coverage of the Fair Labor Standards Act. *10 E. 40th St. Bldg., Inc.* v. *Callus,* 325 U. S. 578, 579. The court said it was much persuaded by the fact that under the definitions of "agriculture" in the Fair Labor Standards Act and "agricultural labor" in the Social Security Act the same result would ensue (159 F. (2d) at 187):

> "Congress, as well as this Court, has recognized that the packing and preparing of agricultural products for the market is a necessary incident to any agricultural operation, for no farmer, dependent upon that which he produces to sustain his operations, could long exist if he could not market that which he produces, *and so long as the operation of washing, packing, and preparing for market by the employees of a farmer is on that only which he has produced on his farm, it is a neces-*

"Senator ELLENDER. Well, then, let me put it this way—I desire to put in in the affirmative now and be more specific—should a large fruit grower have a processing plant of his own, and should he prepare his fruit for market on his own farm, then neither the present law nor the act we are considering would in any wise affect him?

"Mr. WALLING. I think that is correct.

"Senator ELLENDER. Suppose, on the other hand, that a few farmers, small farmers, got together and agreed to purchase machinery for processing their own fruit in the same manner as the large grower does—would they be covered by the proposed act, or would they be exempt?

"Mr. WALLING. I think they would be covered insofar as any produce is handled which is not raised on the particular farm. That is, the exemption goes to the farmer and his employees, but not to the handling of products by someone else, raised by someone else."

The distinction thus drawn by the Administrator has been consistently followed by him from the beginning. See Interpretative Bulletin No. 14, paragraph 10.

> *sary incident to farming and is agricultural labor.* The wheat farmer must thresh his wheat; *the cane grower must cut his cane and make its juice into syrup;* the cotton grower must gin and bale his cotton; the citrus grower must pick and pack his oranges; and the tomato grower must do likewise. So long as these undertakings are in the preparation and packing by him for the market of that which he has grown on his farm, the labor necessary thereto is agricultural labor'' [Emphasis supplied].

The court then rejected the argument that because the employer had over 1,000 acres planted in tomatoes and grew, packed and marketed many carloads in a season, it should be held to be engaged in an ''industrial enterprise'' in view of the size and nature of its operation. The court said (159 F. (2d) at 187) that ''the exemption was not restricted to the forty-acres-and-a-mule farmer. It is not measured by the magnitude of his planting nor in the prolificacy of his harvest.'' See also *Larson* v. *Ives Dairy Company,* 154 F. (2d) 701, 702 (C.C.A. 5); Appellant's main br. pp. 15-17; Reply br. pp. 2-3.

3. Contrary to the Administrator's contention (Br. p. 8) an activity performed by the farmer on his farm, which is otherwise an agricultural activity, is not converted into a non-agricultural activity simply because it is integrated with other activities. Every farmer's activities are integrated in the sense that such activities are related, interdependent and have a common objective in the production and marketing of the farmer's produce. The activities listed *supra,* p. 4, are integrated in that sense.

The chain store analogy offered by the Administrator is not apt (Br. p. 9). In the chain store case the central offices and warehouses are used to serve several retail stores which are located in different states. Here, however, the transportation and processing activities are performed on a single plantation and on the same plantation as the growing activities. Apart from this, the analogy is unsound, because of the difference in language of the two exemption provisions (Section 13(a)(2) and Section 13(a)(6)). The latter by statutory definition is much broader. Neither Section 13(a)(2) nor any other section of the Act defines the

word "retail"; nor does the Act exempt any practice incident to or in conjunction with the retail activity. But Congress did define "agriculture" in Section 3(f) and it did specifically exempt any practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations.[2]

4. It is difficult to take seriously the Administrator's contention (Br. p. 9) that in order for a practice to be "in conjunction with" farming operations, it must occur on the crops being grown at the same time as they are being grown. Such a construction of Sec. 3(f) would render meaningless the examples of conjunctive practices specified in the section, to wit, preparation for market, delivery to market, delivery to storage and delivery to carriers for transportation to market. Patently the crop must be grown before it is prepared for market or delivered to storage or to market or to a carrier for transportation to market. The Administrator recognizes this fact himself for he states (Br. p. 9) that he has some difficulty with whether main line hauling of sugar cane to the mill is "in conjunction with" the growing activity. Yet such main line hauling also takes place in point of time subsequent to the growing activity.

To be given any effective meaning, the words "in conjunction with" must be construed as meaning in "association" or "connection" with the other farming activities and the Record herein shows that the growing, cane transportation and processing activities all occur at the same time albeit on different pieces of sugar cane. The growing, harvesting (including transportation) and processing of sugar cane constitute one continuous operation with only a few hours elapsing between the severing of the cane from its growing position in the fields and the loading of it into

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[2] Just like the factor of integration of appellant's operations, so too the size, industralization and technical and scientific nature of the appellant's operations, all of which are emphasized by the Administrator (Br. pp. 7-8, 11-12), are irrelevant to the question of whether appellant's employees are within the "agriculture" exemption. See our main brief, pp. 15-17 and cases cited therein; our reply brief, pp. 2-3.

cars, the transportation to the mill and the processing into raw sugar and molasses (R. 133, 136, 167, 212). It would be difficult to conceive of any situation that more aptly illustrated practices carried on "in conjunction with" the farming operations than the cane transportation and processing activities here involved.

B. The Administrator has misinterpreted the cases arising in Puerto Rico which involved the "agriculture" exemption in the Act.

1. We have shown that these decisions either support our contentions or are clearly distinguishable from the case at bar (Appellant's Br. pp. 43-47). In any event the cases are not in point because of the clear differences between sugar production in Puerto Rico and in Hawaii.

Under the Puerto Rican system, the "centrale", or sugar mill, is owned by individuals, a partnership or a corporation and grinds sugar cane grown on several separate farms which are (1) farms owned and operated by the centrale, *and* (2) farms owned and operated by independent growers known as colonos who are too small to afford their own mill. The mill may or may not be located on one of the farms whose cane it processes. The centrale also operates a railroad transportation system which hauls to the mill both the sugar cane grown by the centrale on all its farms and also the sugar cane grown by the colonos on their farms. The centrale operates its mill and transportation system as a single enterprise with supervision, employees and a payroll separate from the farms which it operates. The farms in turn have their separate supervision, employees and payroll. As pointed out in the Deputy Administrator's letter to Mr. James Marshall, referred to *infra*, p. 20, (see also Appendix "B" herein, pp. 47-48, *infra*), such a farm through employees under its own supervision and on its own payroll may transport cane to the centrale's mill. More usually, however, each colono has his own portable tracks on his farm, on which he hauls cane to a "concentration point" at the edge of his farm, where his cane is unloaded and delivered to the centrale.

The centrale then reloads the cane on railroad cars on its main line and hauls it to the mill. Where the cane comes from the centrale's own farm or farms, the same system is followed except that, of course, the centrale itself through personnel working on the farm performs all portable track operations.[3]

As the foregoing facts show, the Puerto Rican facts are distinguishable from those in the instant case in the following important respects: (i) In Puerto Rico the main line transportation facilities and mill involved are not incident to or integrated with any single farming operation by one owner-farmer. *Rather they serve many farmers and many farms.* Here, however, appellant transports and grinds only its own cane (R. 159, 184) and all such cane, while grown in different fields,[4] is grown by the one farm (Appellant's Reply Brief, p. 4). See pp. 5-6, footnote 1, *supra.* (ii) In Puerto Rico the railroad transportation system is not located on any single farm as it is in the instant case (R. 159). (iii) In Puerto Rico the cane, after being cut on a farm, is hauled to a concentration point at the edge of the farm where it is unloaded and delivered to the transportation system of the centrale. The centrale then reloads the cane on railroad cars and hauls same to the mill. *Here, however, as the appellees concede* (Br. p. 31) there is no concentration point at which cane is collected and unloaded. Cane cut in the fields is loaded into rail cars and moved in one con-

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[3] These facts as to the centrale system are gathered from the District Court's decision in *Bowie* v. *Claiborne,* (D. P. R. 1939) 1 Labor Cases, ¶ 18,443 and the First Circuit's decisions in *Bowie* v. *Gonzalez*, 117 F. (2d) 11 and *Calaf* v. *Gonzalez*, 127 F. (2d) 934.

[4] The Administrator repeatedly confuses "farm" which includes a number of fields with "field". See, for example, his statement (Br. p. 15) that in *Calaf* v. *Gonzalez,* 127 F. (2d) 934, the locomotives and cars moved from the mill to the "fields" and back. An examination of the facts as stated by the court in that case will show that the locomotives and cars moved from the mill to the several separate "farms" and back.

tinuous operation over portable tracks and permanent tracks directly to the mill (R. 157, 160, 161-162). There is no common pile or piles of cane in any field and no cane is ever piled at the edge of the field (R. 363).[5]

2. The Administrator's emphasis of the Puerto Rican cases, as well as his emphasis of the number of locomotives and railroad cars which appellant uses together with the mileage of its permanent tracks (Br. pp. 7-8, 10-17), shows that the Administrator regards the medium of transportation used by appellant, i.e. railroad, as the basis for denying exemption to the transportation operation. But type of vehicle used by the farmer in hauling his crops to a storage place, a processing plant or any market should make no difference. Brief for American Farm Bureau, p. 8. A farmer, consistent with his means, will use that mode of transportation best suited for his type of farming. In any event, permanent railroad transportation is not the only means of transportation used by Hawaiian sugar plantations to "gather in" the sugar crops. Other methods used are flumes, tractors pulling wagon trains, cableways and motortrucks with the general trend toward large motor trucks.[6] It makes no economic sense to take the position that a Hawaiian plantation transporting its cane by rail is non-exempt in the transportation operation, while one

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[5] These facts (see also Appellant's main br. p. 45, footnote 31) also refute the Administrator's contention (Br. p. 10) that the main line hauling in the case at bar is not part of "harvesting" since the gathering in of the crops is completed in the fields prior to transportation on the permanent tracks. It is as absurd for the Administrator to assert that the gathering in of the sugar cane is completed in the fields on which it is grown as it would be to assert that the cutting of stock feed in the fields completes the gathering in of such stock feed even though it is then taken to storage in a silo on the farm.

[6] Bulletin No. 926, U. S. Dept. of Labor, p. 45. The pertinent excerpt from such Bulletin is set forth in Appendix "A" herein, p. 37, *infra*.

transporting its cane by truck is exempt. Yet that would appear to be the Administrator's position.[7]

3. The Administrator, relying upon *Calaf* v. *Gonzalez,* 127 F. (2d) 934 (Br. pp. 15-16, 21), stresses the following factors in determining whether the exemption applies to transportation employees: whether the workers are employed by the mill and have their names on the mill payroll; whether the locomotives and cars have their depot at the mill and move back and forth from the mill to the farms; whether the persons engaged in the transportation of sugar cane engage in agricultural work; and whether the employees are supervised from and report to the mill.

These factors, while they may have meaning in Puerto Rico, are inapposite here. In Puerto Rico, as we have seen (and this was true in the *Calaf* case), the cane processed at the mill is that grown on several separate farms. One main line transportation system is used to transport cane from all such farms to the mill. Consequently the foregoing factors may well have a bearing upon the question of whether transportation is incident to farming or incident to milling. In the case at bar, however, there is but one farmer and one farm and a transportation system confined exclusively to that farm. There is thus but one payroll,[8]

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[7] It is not clear from his brief what position the Administrator would take as to rail transportation operations of those few Hawaiian plantations which do not operate mills but transport their cane by rail to mills of other plantations (R. 325-326; Appellees' Ex. No. 4 in evidence). To be consistent the Administrator must deny exemption even to the rail transportation operations under those circumstances. This pointedly demonstrates the absurdity of his position.

[8] The inference drawn by the Administrator (Br. p. 16) from the record (R. 116) that appellant's employees engaged in processing and transportation are carried on payrolls other than the one used for field employees is unwarranted. The reasoning employed by the Administrator would lead equally to the untenable conclusion that appellant's employees engaged in cultivating are carried on a different payroll from those engaged in harvesting or in irrigation water supply or in cleaning and weeding or in any other agricultural activity.

one place at which to report for work, one place from which to supervise the employees (R. 137-138) and one place to keep the locomotives and cars. The foregoing factors thus can have no application here.

4. In discussing the Puerto Rican cases the Administrator (Br. p. 12, footnote 4) refers to his annual reports and admits that he recognized therein the fact that Section 3(f) is broad enough to include employees engaged in activities not primarily agriculture. For example he admits the building of a grain silo on a farm even if constructed by a building contractor would be exempt. Nothing in the statutory definition suggests that the construction of the silo by the building contractor is more incidental to the farmer's operations than the hauling by the farmer of his crops to the processing plant on the farm.[9]

5. The Administrator's discussion of *Vives* v. *Serralles*, 145 F. (2d) 552, ignores the fact that the *Vives* case involved two groups of transportation employees, both of which were held exempt. The second group worked on the farm where the mill was located and hauled the cane from the fields on the farm to the mill on the farm. It is misleading, therefore, for the Administrator to state without qualification (Br. pp. 14-15, 17) that in the *Vives* case the court fixed the point at which the portable tracks met the permanent tracks as the dividing line between activities exempt under Section 13(a)(6) and activities not so exempt. Insofar as the second group of employees was concerned, such point did not in the court's opinion mark the end of the harvesting operation, but rather the harvesting operation continued up to the point of the mill. And as the

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[9] If such construction by a building contractor is exempt it would seem to follow that the construction by the farmer of irrigation flumes and pipe for use in the operation of his farm is likewise exempt. While such latter activity was held non-exempt by the court below (Appellant's Br. p. 19) the Administrator's reasoning on the silo construction case would appear to indicate that he regards this holding as wrong and that in his opinion the construction by appellant of flumes and pipes for irrigation is exempt.

court said, paragraph 5(a) of the Administrator's Interpretative Bulletin No. 14 expresses the same view.

Contrary to the Administrator's contention (Br. pp. 16-17), there is no inconsistency between transportation on permanent railroad lines and the location of such transportation system on the farm. While we agree that cane cannot be grown on the "right of way" occupied by appellant's main line railroad tracks any more than it can be grown on the ground where a barn is built, such tracks are as much located on the "farm" as the field roads on which agricultural laborers, supplies and equipment are hauled to and from the fields.

The words "on a farm" as used in Section 3(f) must mean the land or other place, under the ownership or control of the grower, where the growing operation and other operations enumerated in Section 3(f) take place (Appellant's Reply brief, p. 4). It cannot mean simply a cane growing "field". "Farm" is defined in Webster's New International Dictionary (2d ed.), Unabridged, (1945), p. 919 as

> " . . . 6 . . . a piece of land held under lease for cultivation; hence, *any tract of land* (*whether consisting of one or more parcels*) devoted to agricultural purposes, generally under the management of a tenant or the owner; any parcel *or group of parcels of land* cultivated as a unit . . . " [Emphasis supplied].

See also Brief by American Farm Bureau Federation, p. 6, for general meaning of "farm". "In the case of the Territory of Hawaii, a farm means all land which is farmed by a producer, or group of producers, as a single farming unit, with cropping practices, work stock, equipment, labor, and management substantially separate from that of any other such unit". *Determination of a Farm, etc., for the Territory of Hawaii,* made by the Secretary of Agriculture under the Sugar Act of 1937 (Code of Federal Regulations, Title 7, Ch. VIII, Pt. 802, § 802.30 (2 F. R. 2108)). Thus, in this case the farm includes the growing fields, the buildings and yard area, the wooded plots, the field roads, etc. (R. 65, 135-136, 256).

In *Calaf* v. *Gonzales,* 127 F. (2d) 934, 937-938, *the court stated that the transportation operation would be exempt "if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm".* It made this statement despite the fact that it had before it a permanent main line railroad transportation system. The Administrator concedes also (Br. p. 16) that if the heart of the main line transportation system and the situs of the employment of the workers are located on the farm, the exemption applies. That is precisely the case here. Furthermore, in the *Vives* case where the Administrator concedes (Br. p. 16) the heart of the transportation system was on the farm, it must be remembered that the second group of employees held exempt transported the cane from the fields to the mill. Nothing in the court's opinion intimates that the fact that they used a medium, other than a railroad, to effect such transportation was the controlling factor that caused the "heart" of the transportation system to be located on the farm.

C. The wage determinations under the Sugar Act of 1937, relied upon by the Administrator, are irrelevant. If relevant, however, appellant's main line transportation employees are exempt from the Fair Labor Standards Act, since such wage determinations under the Sugar Act have been made with respect to them.

The Administrator emphasizes (Br. p. 15) as the main reason for the court's alleged holding in the *Vives* case the fact that the wages of laborers in the field performing operations up to the concentration point were regulated by the Secretary of Agriculture under the Sugar Act of 1937 (50 Stat. 903; 7 U. S. C. §§ 1100, *et seq.*). The need for a clear dividing line between the coverage of the two acts, the Administrator adds, suggested the concentration point as a useful point of cleavage.

1. The wage determinations of the Secretary of Agriculture under the Sugar Act are not relevant. They are made under a statute which authorizes wage determinations only for employees engaged in "production, cultivation, or harvesting". While the quoted words appear also in the defi-

nition of "agriculture" in the Fair Labor Standards Act, they form but a small part of such definition. As the Second Circuit said in *Damutz* v. *Pinchbeck,* 158 F. (2d) 882, 883, cited in our main brief p. 16, "differing definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one".

2. If, however, the Secretary of Agriculture's wage regulations under the Sugar Act are decisive, appellant's employees engaged in the main line transportation are clearly exempt under Section 13(a)(6) for their wages have been regulated for years under the Sugar Act. For example, in the wage determinations for 1941, 1942, 1943 and 1944, the Secretary of Agriculture (or the War Food Administrator) fixed wages for the following classes of employees, among others, in Hawaii: railroad brakemen, railroad engineers, railroad firemen and conductors. Code of Federal Regulations, Title 7, Ch. VIII, Pt. 802, § 802.34d (6 F. R. 611) (1941); § 802.34e (7 F. R. 3053) (1942); § 802.34f (8 F. R. 8780) (1943); § 802.34g (9 F. R. 869) (1944). All these employees are engaged in main line transportation (R. 162-163). Thus the Secretary of Agriculture has also recognized the distinction explained *supra* pp. 9-11, between sugar cane production in Puerto Rico and that in Hawaii. In Puerto Rico he has made wage determinations only for employees engaged in work up to the concentration point, but in Hawaii his wage determinations have extended as well to main line transportation employees. His most recent wage determination for Hawaii points out that from 1938 to 1944, the wage determinations for Hawaii applied to specified harvest and non-harvest tasks. 13 F. R. 212, 213 (Jan. 16, 1948 issue of Federal Register). Thereafter in view of the existence of collective bargaining agreements, he merely determined that the wage rates should be those agreed upon between producer and laborer without designation of specified tasks. See, for example, the most recent wage determination for Hawaii referred to *supra.* There is nothing to indicate, however, that he ever changed his view as to which operations on Hawaiian plantations constitute "production, cultivation, or harvesting of . . .

sugar cane", the activities specified in the Sugar Act as those for which the Secretary is to determine fair and reasonable wage rates. See Sec. 301(b) of Sugar Act of 1937, *supra,* p. 15, and Sec. 301(c)(1) of the Sugar Act of 1948 (61 Stat. 929; 7 U. S. C. Secs. 1100 et seq.)

D. The broad and sweeping exemptions granted by the Act to "agriculture" and the agricultural processing industries show clearly the legislative intent to exempt all of appellant's operations here involved.

In order that the court may fully understand the solicitude of Congress toward "agriculture" and industries engaged in processing agricultural commodities, we should like to review the treatment accorded "agriculture" and agricultural processing industries in the Act. We find first that in Sec. 13(a)(6) Congress granted a sweeping exemption from both the wage and hour provisions of the Act to all employees "employed in agriculture". Lest there be any mistake as to how far-reaching the exemption was intended to be, a broad and all-inclusive definition of the term "agriculture" was written into Section 3(f) (Appellant's Br. pp. 33-40, 81-87). The first thing included in the definition is "farming in all its branches". There then follows an enumeration (not intended to be exhaustive) of a number of farming operations, to wit, "cultivation and tillage of the soil", "dairying", "production, cultivation, growing, and harvesting of any agricultural . . . commodities", and "raising of livestock, bees, fur-bearing animals, or poultry". Not being satisfied that, as it intended, it had exhausted the scope of agricultural operations, Congress concluded the definition with the catch-all clause "and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". The English language could not more clearly evince the plain intent of Congress to make this definition as broad as possible. The definition, of course, applies to sugar cane as well as to any other agricultural commodity.

But Congress was not satisfied with exempting simply agriculture as thus broadly defined. It desired as well to exempt from overtime requirements either for the entire year or, in the case of seasonal industries for 14 workweeks per year, the processing of *all* agricultural commodities as they come from the farm. To accomplish this result, Section 7(c) was written into the Act.[10] The Administrator in his Bulletin No. 14, ¶ 14, has aptly summarized the effect of Section 7(c) as follows:

> "Thus, it will be observed that this section grants the following exemptions:
>
> "1. A complete exemption from the hour provisions to employees 'in any place of employment' where their employer is engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products.
>
> "2. The same complete exemption where the employer is engaged in the ginning and compressing of cotton, or in the processing of cotton seed.
>
> "3. The same *complete* exemption where the employer is engaged in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap into sugar (but not refined sugar) or into syrup.
>
> "4. An exemption, for a period aggregating not more than 14 workweeks in any calendar year, from the hour provisions to employees 'in any place of employment, where their employer is engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables.
>
> "5. The same *partial* exemption from the hour provisions where the employer is engaged in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations.
>
> "6. The same *partial* exemption from the hour provisions where the employer is engaged in handling, slaughtering, or dressing poultry or livestock" [Emphasis supplied]. *1944-45 WHMan.* p. 566.

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[10] While we are anticipating somewhat in discussing Section 7(c) at this point in our Argument, such discussion is necessary so that the Court may comprehend how thorough Congress was in according a total exemption from the Act's requirements to sugar operations like those of appellant.

No other groups in the American economy were given the same widespread exemptions in the Act as the "agriculture" and agricultural processing groups. So far as sugar cane production and processing are concerned, Section 13 (a)(6) manifests a clear intent to exempt from both the wage and overtime requirements employees engaged in all operations performed by the sugar cane grower or on his farm in connection with growing and marketing his sugar cane crops. As the Supreme Court has said, "employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 612. Section 7(c) manifests a clear intent to exempt throughout the year all processing operations performed upon sugar cane necessary to transform same into raw sugar or syrup, whether such processing is done by the grower or by some independent processor. In the face of such intent of Congress, so fully and plainly expressed in the statutory language, it is preposterous for the Administrator to single out particular segments of the appellant's operations and to stamp them non-exempt. No basis exists, for example, to hold that the appellant's cane growing operations and its cane processing operations are exempt but the operation of transporting the sugar cane from its fields on its farm to its mill on its farm are not exempt, even though such transporting operation is integrally a part of the growing and processing operations. Such a construction of the law flouts the legislative purpose expressed in the Act.

E. The interpretations as to the transportation of sugar cane announced in the Administrator's brief represent a clear departure from previous interpretations long followed by the Administrator and never publicly modified. Accordingly, and since the interpretations here advanced are in any event legally untenable, they are entitled to no weight.

The Administrator states (Br. p. 17) that the interpretations he urges in his brief have long been and long remained his official position. This statement is woefully incorrect.

1. Whenever the Administrator, because of a judicial decision, has modified a previously announced interpretation as expressed in one of his interpretative bulletins, he has done so by a re-publication of the bulletin or by a press release bringing the modification to the attention of employers, employees and others. For example, after the decision in *Bowie* v. *Gonzalez,* 117 F. (2d) 11, the Administrator issued a press release stating that in the light of that decision he was of the view, contrary to the position taken in Bulletin No. 14, that the Section 13(a)(6) exemption does not apply to sugar mill employees even though they grind only cane grown by the sugar mill owner in his fields. Neither after the *Bowie* decision nor that in *Calaf* v. *Gonzalez,* 127 F. (2d) 934, which the Administrator now relies upon so heavily, nor at any other time did the Administrator ever advise sugar plantations or mills or their employees or the public generally that he was changing the opinion expressed in ¶ 10(f) of Bulletin No. 14, issued in August, 1939, that hauling by the mill operator of his own grown cane to his mill constitutes "agriculture".

2. The Administrator seeks to show that he had nonetheless changed his interpretation on sugar cane transportation after the *Calaf* decision by referring to three documents (Br. pp. 19-21): (i) his release, G-322, dated May 20, 1943, published incident to his approval of a wage order for the Sugar and Related Products Industry; (ii) a letter dated November 26, 1942, written by William B. Grogan, acting for the Administrator, to Mr. Paul Guillot of Paincourtville, Louisiana; and (iii) a letter dated October 9, 1946, from the Deputy Administrator to Mr. James Marshall, Director of the Sugar Branch, Production and Marketing Administration, U. S. Department of Agriculture.

The Administrator admits (Br. p. 21, footnote 5) that the two letters above cited were never made the subject of a press release nor were they printed in the standard labor law reporting services. The situation is comparable to that of the Administrator's preparing a memorandum concerning his change of position and then proceeding to file such memorandum in his desk drawer or in his files and never advising the public about it. To accord weight to the

changed position under such circumstances would offend basic principles of elementary justice.

Apart from this, neither release G-322 nor the above two letters in fact represented any change in the position taken in ¶ 10(f) of Interpretative Bulletin No. 14. We have set forth in Appendix "B" herein, pp. 37-38, *infra,* the pertinent part of the text of G-322. As shown therein the Administrator affirmed ¶¶ 1-13 of Interpretative Bulletin No. 14 *in toto,* and that includes ¶ 10(f). His statement in G-322, that whether employees engaged in transporting sugar cane from a farm to a mill are to be regarded as employed in agriculture is a question of fact to be determined upon the basis of all the evidence and the applicable rules of law, is hardly the equivalent of the adoption by him of the principle of law which he alleges was laid down in the *Calaf* case. See also Appendix "B" herein, pp. 38-42, *infra,* where we set forth excerpts from the Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943. Such excerpts contain the discussions pertaining to the application of the "agriculture" exemption to cane transportation, which preceded the issuance of the wage order. They too show a reaffirmation by the Administrator of Interpretative Bulletin No. 14, including ¶ 10(f) thereof.

The letter to Mr. Guillot was in response to one addressed by Mr. Guillot to the Administrator under date of September 29, 1942. The full exchange of correspondence is set forth in Appendix "B" herein, pp. 42-46, *infra.* Mr. Guillot raised a question about sugar cane transportation and processing operations in Louisiana, where, *as his letter shows, the mill operators do not transport simply the cane they grow themselves but also transport cane grown by other farmers* which is processed at the mill. See too Brief of American Sugar Cane League of U. S. A., Inc. as *amicus curiae* herein, pp. 2, 3-4. Moreover, since the Guillot letter was dated November 26, 1942, and preceded G-322 (which reaffirmed ¶¶ 1-13 of Interpretative Bulletin No. 14), nothing said in that letter can be taken to detract from the Administrator's subsequent reaffirmation of such paragraphs. But if the letter does represent a change in the position asserted in ¶ 10(f) of the Bulletin, the subsequent shift back

to ¶ 10(f), as revealed by G-322, shows that the Administrator's final position was that stated in the Bulletin.

The letter to Mr. Marshall (Appendix "B" herein, pp. 46-49, *infra*) dealt with transportation in Puerto Rico and alluded to the centrale system. It was that system to which the Deputy Administrator referred when he wrote that "the mere fact that the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the farm to the mill is 'incident to farming' and therefore exempt under Section 13(a)(6)". Such opinion is irrelevant here where there is only one farm, one farmer and the transportation system operated by that farmer is located on that farm and serves only that farmer and that farm. Moreover, the Marshall letter admits that hauling cane under the circumstances of this case is exempt, for it states:

> "Truck drivers transporting cane on a farm as an incident to the farming operations on that farm would, of course, be exempt. However, since the truck drivers deliver the cane to a mill, I assume that this transportation involves working off the farm, in which case the transportation of the sugarcane would be exempt under Section 13(a)(6) only if performed by employees of the farmer, as an incident to the farming operations of the farmer. In the ordinary case, an employee of a farmer who is employed by the farmer to haul the farmer's own cane to a mill or factory would be exempt under section 13(a)(6)"

3. The Administrator never until this lawsuit changed his position as expressed in ¶ 10(f) of the Bulletin. He never enforced any other rule in Hawaii, although he has maintained an office in Hawaii since the beginning of his enforcement activity under the Act and has conducted frequent inspections on Hawaiian sugar plantations to check on compliance with the Act. The plantations generally, including appellant's, have always treated their main line transportation employees as exempt under Section 13(a)(6) and the Administrator has never even as much as hinted that in doing so they were violating the Act. Even the appellee union, which frequently consulted the local

wage-hour office on matters pertaining to compliance with the Act by the sugar plantations, makes no mention in its brief herein of any changed ruling on sugar cane transportation by the Administrator. On the contrary it asks simply that the ruling in ¶ 10(f) of Interpretative Bulletin No. 14 be disregarded (Appellees' Br. p. 21).

4. But even assuming that the Administrator in fact changed his opinion as expressed in ¶ 10(f) of his Bulletin and ruled otherwise on cane transportation, such changed opinion is entitled to no weight. *Supra,* p. 2. The interpretations, which the Administrator seeks to apply here, are not as we have seen his initial interpretations made soon after the Act went into effect and consistently followed, but rather some newly devised interpretations contrived to defeat appellant's position under the circumstances herein.

F. The Administrator's interpretation on main line transportation is inconsistent with his interpretation on the hauling of agricultural supplies, equipment and laborers to and from the fields. It is also inconsistent with his interpretations concerning many of the other important activities engaged in by appellant's employees.

It is conceded by the Administrator in Interpretative Bulletin No. 14, ¶ 10(f) that the hauling of supplies, equipment and laborers by the farmer by truck to and from the fields is exempt under "agriculture". The Administrator does not in his brief indicate that he has changed this interpretation in any way, despite the fact that the court below held such hauling non-exempt (R. 441-442, 444; appellant's main Br. pp. 11-12, 17, 18). The Act could not have contemplated any distinction in the treatment of the hauling of cane from the fields and the hauling of supplies, equipment and laborers to the fields when performed by the farmer in connection with his own operations. It should also be noted that unlike transportation of the raw produce from the fields to the processing plant or to storage or to market or to carriers for transportation to market, which is specifically mentioned in the "agiculture" definition as

an exempt activity, there is no such mention of the hauling of supplies and equipment to and from the fields.[11]

Furthermore as shown by our main brief (pp. 18-19), the District Court also held non-exempt under Section 13(a)(6) the following activities, among others, performed by the appellee employees: (a) Hauling by truck plantation supplies and equipment from Honolulu to the plantation; (b) Maintenance, repair and operation of appellant's trucks and field roads on the farm; (c) Repair and overhauling of agricultural equipment; (d) Shoeing of horses and mules; (e) Storage and handling of farm supplies and equipment; (f) Construction and repair of irrigation facilities and equipment. For the reasons we have heretofore advanced (see also the brief herein of the American Farm Bureau Federation, pp. 2-3, 6-8) we submit that all such activities are exempt. The Administrator also has held such activities to be exempt when performed by the farmer or on the farm (Appellant's main Br. p. 50; Brief of American Farm Bureau Federation, pp. 18-19). The Administrator's failure to acknowledge in his brief that these activities are exempt must be attributed to a desire to avoid the embarrassment of the necessary inconsistency between such opinion and his presently asserted opinion that the main line transportation operations of appellant are not exempt. Such transportation, under any reasoning, is as much entitled to the exemption as the activities above listed.

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[11] See too *Bowie* v. *Claiborne*, (D. P. R. 1939) 1 Labor Cases ¶ 18,443, holding exempt under Section 13(a)(6) employees hauling supplies and equipment from places off the farm to the farm. This is the decision of the District Court of Puerto Rico which, as affirmed by the First Circuit under the name of *Bowie* v. *Gonzalez*, is so heavily relied upon by appellees and the Administrator (Appellees' Br. pp. 23-25 and Administrator's Br. pp. 10-12).

II.

Nothing in the Administrator's Brief Detracts from the Application of the Sec. 7(c) Exemption to All Employee Appellees Who Are Engaged in the Hauling of Sugar Cane from the Fields to the Mill, the Processing of Sugar Cane Into Raw Sugar, and Their Incidental and Functionally Necessary and Indispensable Operations.

A. All such employees are engaged in the processing of sugar cane into raw sugar and work in the "place of employment" where the appellant is engaged in such processing.

The stipulated facts (R. 129-256) reveal beyond question that the appellant simply produces sugar cane and processes such sugar cane into raw sugar and molasses. The parties stipulated that—

> "the business of the Plantation has been and continues to be the growing, cultivating and harvesting of sugar cane on lands owned or leased by the Plantation; the processing of such sugar cane into raw sugar and molasses; the bagging, loading and shipping of the raw sugar to refineries situated in the continental United States; and the loading and shipping of molasses in bulk to continental United States, all of which is hereinafter described" (R. 131).

As a matter of common sense, then, all appellant's activities constitute either sugar cane production exempt under Sec. 13(a)(6) or sugar cane processing exempt under Sec. 7(c). And all of the activities exempt under Sec. 7(c) take place in the same "place of employment" where the appellant processes sugar cane into raw sugar.[12] The Adminis-

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[12] Contrary to the Administrator's statement, (Br. p. 25) nowhere do we contend that the "place of employment" in the instant case is the entire plantation. We contend simply that the "place of employment" embraces not only the mill building but also all other areas on the plantation where operations necessary and indispensable to cane processing are carried on. See our main br. pp. 53-55, 60-64, 89-92.

trator's assertions (Br. pp. 24, 25-27) that a number of appellant's employees are engaged in activities not closely related either to sugar cane production or processing and work in departments, areas or buildings not devoted to the exempt operations, are directly in conflict with the Record.

B. The Sec. 7(c) exemption applies to appellant's employees engaged in cane transportation.

1. The train crews who operate the trains herein merely deliver the loaded cane cars to the mill and pick up the empty cane cars. The unloading of the cane cars, their movement into the unloading platform at the mill, and their movement away from the mill are handled by employees in the cleaning plant of the mill (R. 161-163, 166, 168-169, 171, 234, 236-237). The Administrator's brief seeks to create a wholly novel interpretation of the Sec. 7(c) exemption as regards transportation employees, by excluding from the exemption those transportation employees not performing some duties at the mill such as unloading of sugar cane (Administrator's Br. pp. 23, 30). The Administrator has never heretofore sought to enforce the Act on any such basis. Under the Administrator's newly created limitation, no transportation employees of appellant would be exempt.

This result stands out in striking contrast to the fact that in the sugar cases arising in Puerto Rico it was held that transportation is "incident to milling". It was assumed in those cases, therefore, that such transportation was exempt under Sec. 7(c).[13] *The Administrator's brief does not explain why the cases arising in Puerto Rico should be regarded as supporting his Sec. 13(a)(6) conclusions, because transportation is "incident to milling" (Br. pp. 10, 13-17), and nevertheless that such cases do not support appellant's contention that transportation is exempt under Sec. 7(c).*

The Puerto Rican cases, it will be noted, involved, among others, transportation employees who did no work at the mill. In the *Bowie* case, *supra*. p. 10, the employees involved included those engaged in the repair and mainte-

[13] The court below recognized that in denying the Sec. 7(c) exemption to employees engaged in transportation work, its holding was contrary to that of the Puerto Rican cases (R. 425).

nance of the transportation facilities. And in the *Calaf* case, *supra,* p. 10, the employees who were held to be engaged in work "incident to milling" included those engaged in the following types of work: construction and repair of rolling stock, fireman, brakeman on the locomotive, splitting wood for engines, repairing main railroad line, signalling at grade crossings, and repairing of railroad carts. If employees engaged in such work were exempt under Sec. 7(c), so are the cane transportation employees in the instant case.

2. The Administrator repeatedly suggests that in order to enjoy any Sec. 7(c) exemption, the employee must actually work "in" the place of employment where the processing operation takes place (Br. pp. 25, 26, 28, 30-31). In this connection, he quotes (Br. pp. 28, 29) excerpts from his release R-1892 dated January, 1943. But when this release is examined in full (Administrator's Br. pp. 42 *et seq.*) it is found that this is not the Administrator's position at all, for in the release he announces without qualification that the Section 7(c) exemption applies to

> "those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant" (Administrator's Br. p. 44).

There is no limitation here that such transportation employees must do some work "in" the processing plant, such as unloading or loading, in order to enjoy the exemption. Thus the Administrator's own release, R-1892, upon which he now relies, does not support him but clearly supports appellant's contentions.

Nor does R-1892 stand alone among the Administrator's interpretations. His other interpretations plainly include in the exemption many types of employment not located "in" the place where the processing occurs. See our main brief, pp. 89-92. Indeed the Administrator has held exempt under the Sec. 7(c) sugar cane processing exemption employees of a sugar mill engaged in hauling raw sugar from

the mill to a warehouse located seven miles away. *1944-45 WHMan.* p. 609. And, as pointed out in our main brief (pp. 61-62), the Administrator has gone so far as to declare that handling, labeling and casing operations in a cannery storage place may be considered as performed in the same "place of employment" as the canning operation, even if the storage place is in a county contiguous to that in which the cannery building itself is located. And the Wage-Hour Division has also ruled that "truck drivers who carry raw materials to the establishment, or who transport away from the establishment goods upon which exempt operations have been performed, may be considered as working in the "place of employment" within the meaning of this section [Sec. 7(c)]". See letter written by Mr. William Grogan for the Administrator to Mr. Paul Guillot, dated November 26, 1942, quoted in part in the Administrator's brief, p. 20 and set forth in full in Appendix "B" herein, pp. 43-46, *infra*. We are at a loss to understand how, after issuing such rulings, the Administrator can now for the first time, in the appellate stage of this litigation, seek to obtain the restrictive "place of employment" interpretation urged in his brief.

C. The cases cited by the Administrator do not support his presently asserted position on Sec. 7(c).

The cases cited by the Administrator (Br. pp. 27-28) all relate either to the Sec. 7(c) exemption for the first processing of milk, whey, skimmed milk or cream into dairy products, or for handling, slaughtering or dressing poultry or livestock. Furthermore, in each of the cases cited the employer not only was performing the operations described in the exemption language of Sec. 7(c), but also was performing other operations that such exemption language does not describe. For example, in *Walling* v. *Bridgeman-Russell*, (D. Minn. 1942) 6 Labor Cases ¶ 61,422, the employer at his place of business not only was engaged in the first processing of milk and cream into dairy products, but he was also wholesaling eggs, fountain supplies, frosted foods, meats and other commodities and he was making ice cream mix and ice cream. Also he was cutting, printing and packaging butter made in other places of employment. Again in

Fleming v. *Swift,* 41 F. Supp. 825 (N. D. Ill. 1941) the employer not only was handling, slaughtering and dressing livestock but was also engaged in meat-curing, sausage-making, and manufacture of dog food, soap, glue and industrial oils. Accordingly the exemption in those cases was limited to those departments of the employer's business engaged in the operations described in Sec. 7(c).

In the case at bar, however, aside from the growing of cane, the appellant is engaged exclusively in an operation which 7(c) exempts; namely the processing of sugar cane into raw sugar. The Administrator himself has recognized that this distinction exists among the different plants subject to Sec. 7(c) exemptions and that under the circumstances where an employer is engaged exclusively in an operation which 7(c) exempts, the exemption applies to all activities functionally necessary and indispensable to the exempt operation. See p. 89 of our main brief, setting forth an opinion of the Administrator, to which he fails to make any reference in his brief. See also the cases discussed in our main brief (pp. 57-59 and footnote 41 on p. 59) which are to the same effect. In fact the very release (R-1892), which the Administrator emphasizes, recognizes this same distinction (Administrator's br. pp. 44-45, 46), which is ignored in the Administrator's brief.

D. The Section 7(c) exemption applies to the appellant's service shop employees.

The Administrator's argument on "place of employment" is most difficult to comprehend as applied to the appellant's service shops. First he appears to argue (p. 26, footnote 8) that even where several buildings operated by an employer are located on the same premises, nonetheless they are not part of the same "place of employment" if one of the buildings is a self-sufficient unit performing operations independently of operations in the other buildings. A failure to integrate the operations thus, according to the Administrator, would defeat the Sec. 7(c) exemption for the non-integrated unit. But this can have no meaning here since, as both the appellees (Br. p. 7 *et seq.*) and the Administrator (Br. p. 8) argue so strenuously, all of appellant's operations are highly integrated.

Next the Administrator argues (Br. p. 30) that a service shop is not a "place of employment" where the appellant is engaged in processing sugar cane into raw sugar because it is used to service the transportation facilities as well as the mill. But if transportation is incident to milling, as the Administrator has contended, the repair of the transportation facilities is likewise so incident; and both of them are part of processing. This means that necessarily they take place in a "place of employment" where the employer is engaged in processing.

The "processing" of sugar cane contemplated by Sec. 7(c) is more than the operation of automatic machinery which grinds the cane and extracts its juices. "Processing" includes a series of operations, such as the hauling of the cane to the mill, the cleaning of the cane, the grinding of the cane, the repair of the processing and hauling machinery and the delivery of the raw sugar to the carrier. Each of these is just as indispensable and as much a part of sugar cane processing as the watching of gauges in the boiling house of the mill. Wherever such activities take place, therefore, they are performed in a "place of employment" where the employer is engaged in processing sugar cane with the result that all employees engaged therein are exempt under Sec. 7(c). This is also the answer to the Administrator's contention (Br. p. 25) that employees may not be exempt under Sec. 7(c), although their work is incidental or necessary to processing, because such work does not occur in the "place of employment" where the employer is engaged in actual processing. Operations incidental or necessary to processing are themselves processing and therefore take place in a "place of employment" where processing is carried on by the employer (Appellant's main br. pp. 53-54; R-1892 (Administrator's Br. pp. 44-45)).

E. The Sec. 7(c) exemption is not lost when work is performed while the mill is shut down for the annual period of repair and reconditioning.

1. *Maisonet* v. *Central Coloso* (D. P. R. 1942) 6 Labor Cases, par. 61,337, relied upon by the Administrator (Br. p. 32) as showing that the Sec. 7(c) exemption does not apply during appellant's off-season, is distinguishable. In the instant case, as pointed out in our main brief, pages 67-68, the stipulated facts are that the average number of man days of work performed in the mill during each 24 hour period during the off-season is 116 and that is precisely the same as the average number of man days of work performed in the mill during each 24 hour period of the grinding season. The employees at the mill work a 48 hour workweek both during the grinding season and off-season (R. 215). Thus, here, unlike the situation in the *Maisonet* case, the appellant's mill could not easily spread employment sufficiently during the off-season so as to avoid the necessity of overtime work.

2. Contrary to the Administrator's assertion (Br. pp. 32-33), the stipulated facts make it clear that appellant's off-season repair work is designed simply to insure the uninterrupted functioning of the mill (R. 210-213), and not, as in the *Maisonet* case, to safeguard appellant's capital investment and for the installation of improvements. The grinding season is limited only by the needs of mill maintenance, as the appellee union itself has said to a Congressional Committee (Appellant's Br. pp. 67, 93).

3. We agree with the Administrator (Br. p. 33) that the exemption applies during the week-end shutdown because the work at that time is concerned with keeping the mill operating and is closely related to the actual processing operation. But as we have shown, the same is true of the work performed during the off-season. If actual processing is not necessary to sustain the Sec. 7(c) exemption during the week-end shutdown, neither is it necessary to sustain such exemption during the off-season. The Administrator by his admission of the exemption during the week-end shutdown has himself refuted his unequivocal state-

ment (Br. pp. 31-32) that Sec. 7(c) applies only if at the time the employer is engaged in actual "processing".

4. The Administrator does not weaken the effect of admissions by him and the Secretary of Labor (Administrator's Br. p. 33) that the Section 7(c) exemption for sugar cane processing is a "52-week overtime exemption", by now asserting that such statement is based on the premise that sugar cane processing operations are being conducted during the entire year. Sugar cane is grown in Puerto Rico, Louisiana, Florida, and the Virgin Islands, as well as in Hawaii. Sugar beets are grown in the Rocky Mountain and North Central states area.[14] In all these areas except Hawaii the operating season is only five or six months per year. See *Bowie* v. *Gonzalez,* 117 F. (2d) 11, 14 (Puerto Rico); *1944-45 WHMan.,* pp. 643-644 (Louisiana); Id., p. 1520 (beet sugar industry). In Hawaii, however, the operations take place the year around, except insofar as they are required to shut down for annual repairs (R. 136, 152, 210-212; Bulletin No. 926, U. S. Department of Labor, p. 64; Appellees' Br. pp. 6-7). Hawaii then is the only place in the United States which has year-around production. It must be assumed, therefore that Congress had Hawaii in mind when it granted a year-around exemption in Sec. 7(c) to sugar cane processing. See further appellant's main brief, pp. 65-68.

5. The Administrator contends (Br. p. 31) that denial of the exemption during the off-season is consistent with the legislative purpose of Sec. 7(c). He states (Br. p. 24, footnote 6, citing *Walling* v. *Swift,* 131 F. (2d) 249, 251), that the general purpose of Section 7(c) was to enable the employer to avoid the burden of overtime in those seasonal periods when he must work to take care of the product on the market, the amount of which depends upon factors beyond his control. The *Swift* case, however, involved only a 14 workweeks seasonal exemption granted by Sec. 7(c) for

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[14] Agricultural Statistics, U. S. Department of Agriculture, 1947, pp. 89, 94, 95, 96, 97, 98-99 (Tables 117, 123, 125, 127, 128, 130). These statistics show that sugar cane and sugar beets are produced in large commercial quantities, insofar as the United States is concerned, only in the places specified in the text.

handling, slaughtering and dressing livestock. The purpose of Section 7(c) was necessarily different with respect to the industries granted year-around exemptions, such as the industry processing sugar cane into raw sugar, than it was with respect to the industries granted only a seasonal exemption.

III.

The Administrator's Brief Does Not Detract from Appellant's Contention That Any Employee Appellee, Who in a Workweek Performs Some Work Exempt Under Section 13(a)(6) or Section 7(c) and Does Not Engage for Any Substantial Part of His Time in the Same Workweek in an Activity Which Is Not So Exempt, Is Exempt for That Workweek from the Overtime Provisions of the Act.

1. The Administrator argues that by their terms, Sections 13(a)(6) and 7(c) "provide a very broad tolerance for activities which are not of a strictly agricultural nature" or processing character. On the other hand in the case of the other exemptions in the Act where he has permitted a tolerance of non-exempt work, the exempt occupation is designated only by an undefined word or phrase [15] (Br. pp. 34-35, 38-41).

The Administrator has apparently forgotten in this part of his brief the argument which he made earlier (Adminis-

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[15] One of the exemptions to which the Administrator has accorded a 20% tolerance of non-exempt work is the Section 13(a)(5) fishing industry exemption (Appellant's Br. p. 94). To refer to such exemption as one designated by simply an undefined word or phrase is absurd in view of the fact that Section 13(a)(5) exempts as follows:

> "any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof."

trator's Br. pp. 7-34) with respect to the Sections 13 (a)(6) and 7(c) exemptions. Far from according to such exemptions the breadth to which he now alludes, he would so narrowly construe the exemptions as to make them wholly unworkable and unusable for most farmers and farms and for most processors of agricultural commodities.

If in fact, as the Administrator now argues, Sections 13 (a)(6) and 7(c) by their terms provide a very broad tolerance for activities which are not of a strictly agricultural or agricultural processing nature, then all the activities of appellant, which we have shown in our brief are necessary and indispensable facets of its growing and processing operations, come within the statutory language exempting "agriculture" or "processing". If, on the other hand, Sections 13(a)(6) and 7(c) do not themselves provide the tolerance to which the Administrator alludes so that in performing the operations necessary and indispensable to growing of crops and processing them, the exemption is lost, there is the same justification for allowing such tolerance with respect to Sections 13(a)(6) and 7(c) as with respect to any other exemption in the Act. Such justification as the Administrator recognizes (Br. pp. 40-41) is that many employees in occupations intended by Congress to be exempt under one or another of the exemption provisions perform some duties, which do not strictly fall within the literal language of the exemption provision. A failure to allow some tolerance therefore would result in so widespread a denial of the exemptions as to substantially defeat the Congressional intention in enacting them.

2. A number of the authorities cited by the Administrator in this part of his argument are not in point. Thus on page 35 of his brief he cites cases involving exemptions granted to "any employee" of particular types of employers, e.g. "any employee" of a retail establishment, where the employer engages in two wholly separate businesses, one within the exemption and one outside it. For example, in *Davis* v. *Goodman Lumber Co.* 133 F. (2d) 52 (C. C. A. 4) the employer operated a retail lumber yard and a manufacturing business wholly extraneous to the retail lumber business. The Court held the retail establishment exemption inapplicable to employees engaged in the manufactur-

ing business. The situation here is different since appellant is engaged in just one type of business and nothing it does is extraneous to its production or processing of sugar cane.

3. Other authorities cited by the Administrator (Br. p. 37) fully support appellant's position. *Thus Anderson* v. *Manhattan Lighterage Corp.*, 148 F. (2d) 971 (C. C. A. 2) involved the Sec. 13(a)(3) exemption for seamen. It appeared that 95% of the employees' duties were non-exempt. The court properly regarded this as a substantial amount of non-exempt work and held the exemption inapplicable. However, it recognized as sound the principle that only if the employee engaged in a substantial amount of non-exempt work would he lose the exemption. The Administrator in his brief (p. 41) (see also appellant's main Br. p. 94) affirms this principle as applied to Section 13(a)(3).[16]

Respectfully submitted,

Rufus G. Poole,
Charles Fahy,
Milton C. Denbo,
Philip Levy,
1625 K Street, N.W.,
Washington, D. C.,
Attorneys for Waialua Agricultural Company, Limited.

Of Counsel:

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By E. C. Moore,
Alexander and Baldwin Building,
Honolulu, T. H.

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[16] The Administrator cites (Br. p. 37) *North Shore Corp.* v. *Barnett*, 143 F. (2d) 172 (C. C. A. 5), as authority for the proposition that an employee engaged as a telephone operator within the meaning of Section 13(a)(11) is not exempt if he performs other duties of a non-exempt nature. While the case does so hold, the Administrator's citation thereof is surprising since the holding is contrary to the Administrator's allowance of a 20% non-exempt work tolerance for such switchboard operators (Appellant's Br. p. 95), a tolerance which the Administrator continues to justify as necessary to give substance to Section 13(a)(11) (Administrator's Br. p. 41).

APPENDIX A

METHODS OF CANE TRANSPORTATION ON HAWAIIAN PLANTATIONS.

"Each plantation has adopted that method, or combination of methods [of transportation] best suited to its local conditions. The methods are: (a) Railroads, with both permanent and portable tracks, (b) flumes, (c) tractors pulling wagon trains, (d) cableways, and (e) motortrucks. The general trend is toward very large motortrucks, but plantation railroads still carry the bulk of the Hawaiian cane from the field to the mill". *Bulletin No. 926, U. S. Department of Labor,* p. 45.

APPENDIX B.

ADMINISTRATOR'S RELEASE, TRANSCRIPT OF PROCEEDINGS OF INDUSTRY COMMITTEE FOR SUGAR AND RELATED PRODUCTS INDUSTRY, AND OPINION LETTERS OF WAGE AND HOUR DIVISION DEALING WITH APPLICATION OF SECTION 13(a)(6) TO CANE TRANSPORTATION.

1. *Release G-322 published incident to Administrator's approval of a wage order for the Sugar and Related Products Industry (8 F. R. 7098).*

> "No objection to the definition of the Sugar and Related Products Industry was offered by any interested party at the public hearing before Major Campbell. Objection was, however, raised in a brief filed with the Committee by the American Sugar Cane League of the U. S. A., to that part of the definition which reads: 'The production of any products covered under this definition shall be deemed to begin with the loading of the raw materials at the farm.' Objection to this language was also voiced by Mr. Ernest W. Greene, Washington, D. C., a representative of the employers on the Committee. A proposed amendment of the above language was offered on behalf of the Hawaiian Sugar Planters Association. I have carefully considered these objections and suggestions upon the evidence in the record. Any apprehension that the language in question may be regarded as including agricultural employees who are exempt from the Act's minimum wage provisions under Section 13(a)(6) is hardly justified in view of the fact that Administrative Order

No. 162 appointing Industry Committee No. 50 and defining the Sugar and Related Products Industry, specifically excepted from the scope of the Committee's jurisdiction 'employees exempted by virtue of the provisions of Section 13(a) * * *.' "*

*"Administrator's Exhibit 1-A, paragraph 4. Whether or not a particular employee engaged in loading or transporting sugar cane from a farm to a mill is to be regarded as 'employed in agriculture,' as agriculture is defined in Section 3(f) of the Act, and hence exempt from the minimum wage provisions of the Act under Section 13(a)(6), is a question of fact to be determined upon the basis of all the evidence and the applicable rules of law. See Interpretative Bulletin No. 14, paragraphs 1-13. See also the decision of the Circuit Court of Appeals for the First Circuit in the case of *Calaf* (*Collazo*) v. *Gonzalez,* 127 F. (2d) 934, where it was decided that the Section 13(a)(6) exemption was inapplicable to employees engaged in transporting sugar cane from their employer's farm to their employer's sugar mill, even though the cane was grown by the employer of the employees in question. See also the decision in the case of *Gonzalez* v. *Bowie,* 123 F. (2d) 387 (C. C. A. 1), to the effect that the Section 13(a)(6) agricultural exemption was inapplicable to employees transporting sugar cane of independent growers to their employer's sugar mill."

2. *Excerpts from Informal Hearing and Meeting of Industry Committee No. 50 for the Sugar and Related Products Industry held January 5, 1943.*

"Mr. Greene: May I ask a question at this time, Mr. Chairman?

"Chairman Kreps: Surely.

"Mr. Greene: Greene is my name. I wish to speak to the point of this brief to the extent of its comment on the definition. My comments have nothing to do with Mr. Winston's. In the second paragraph of the definition contained in the Administrative Order it says: 'The production of any products covered under this definition shall be deemed to begin with the loading of the raw materiasl at the farm.' That definition in the light of the Interpretative Bulletin No. 14, issued some time ago by the Wage and Hour Division, was a little confusing to many of us, not as an argumentative or technical point but merely as a matter of clarity and of knowing where these wages which we are now discussing are to begin, and in the economic data we find

that the case of *Calaf et al.* vs. *Gonzales et al.* is cited as authority for the definition, which would deny exemption to any employees even of the owner of a farm engaged in transporting sugar cane from the farm to the factory on the ground of the decision in that Calaf case insofar as the layman can read it. That decision was based upon conditions peculiar to Puerto Rico, an area not covered directly by the Act, to which the Act applies only when specially invoked for it by a special Committee, not a Committee such as this, and conditions which do not obtain generally throughout certain other sugar cane producing areas. We find a recognition of that by the Court when the decision contains the following: 'We would be presented with a very different problem if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located on the farm.'

"Now without laboring any lengthy discussion, it is customary in the territory of Hawaii for a sugar cane farm to be a large scale farming unit complete with a processing plant for grinding the sugar cane and producing raw sugar located at some convenient point on the farm with the farm containing a transportation system for serving that, the fields and the plant, and the situs of the employment of the workers in the heart of the transportation system is very decidedly on the farm. Now I realize that nothing that is put out by way of definition and nothing that I or anyone else on this Committee can say can change the statute or the decision of a court, but I do wish to point out that this definition, which has been set up to guide us as to where these wages which we are discussing would apply, seems to me to ignore the language of the court which applies directly to conditions which exist in many cases in Hawaii and I believe that the distinguished member from Louisiana will agree that it applies also to many cases in Louisiana where you do not have the separate farm property, separate mill property, visualized in a court decision that apparently existed in that case. I wish to bring to the attention of the Committee that that definition seems to me to be out of order.

"Chairman Kreps: Thank you, Mr. Greene. Does anyone else wish to speak to this particular point?

"Mr. Shishkin: Mr. Chairman.

"Chairman Kreps: Mr. Shishkin.

"Mr. Shishkin: It seems to me that the brief just discussed raises a question of definition and it might be useful for the Committee to hear a representative of

the Wage and Hour Division read the present definition and also indicate to the Committee the extent of coverage of the Fair Labor Standards Act in terms of the statutory minimum wage application to the industry at the present time so that we will have a clear idea as to the extent to which the Act applies.

* * * * * * * * *

"Chairman Kreps: The brief and certain legal aspects have been called into question and I suggest we therefore turn to the staff. May I ask Dr. Klingenfeld to speak to this point?

"Mr. Klingenfeld: Mr. Chairman, I should like at this time to refer the matter to our economist, Mr. Hughes, who will take up the definition in connection with his study, and also will speak to the point raised by both Mr. Greene and Mr. Shishkin. If that is all right with you, I should like to refer the thing to Mr. Hughes in his general presentation of a report.

"Chairman Kreps: Mr. Hughes will explain the economic report, of which all of us have been given a copy.

"Mr. Hughes: First with respect to the definition, the intention behind this definition was to put together in one industry as many competitive products and essential processes as possible so as to bring them to the attention of the Industry Committee with dispatch. There is no question but what refined sugar and beet sugar are competitive, nor is there any question but what raw cane sugar and beet sugar are competitive even though raw cane sugar has to be further processed before being used. The processing of sugar cane into raw cane sugar is competitive with the processing of sugar cane into syrup inasmuch as both processors have to compete for sugar cane in some areas, and in those areas where sugar cane syrup manufacturers and raw sugar manufacturers are locted within the same vicinity they have to compete for labor. All the syrups covered herein are competitive with sugar to the extent that they are used as substitutes for sugar, and maple syrup, of course, is covered because of its competition with sugar cane syrup and sorgo syrup.

"With respect to the operations covered, the intention behind the definition is to cover all those which were not otherwise exempt. The definition does not and cannot cover any operations which are specifically exempt from the wage provisions of the Act. Thus, any operations which are now exempt as being agricultural under Section 13 (a) (6) of the Act would remain

exempt and any operations which now get the benefit of the area of production exemption, Section 13 (a) (10), would also remain exempt. The establishments which would be primarily covered by this definition are cane sugar refineries, raw sugar factories, syrup manufacturers, and beet sugar factories. As indicated in the report, these establishments are pretty generally distributed over the entire United States, with certain types of establishments being centralized in certain areas, as, for example the manufacture of raw sugar in Louisiana, Hawaii, and Florida, and beet sugar factories being located principally in the Middle West and Far West.

* * * * * * * * *

"Chairman Kreps: Any other questions any of the committee members would like to ask of Mr. Hughes? I am wondering whether Mr. Brown might give us some—returning to the point of the definition—whether Mr. Brown would like to give us his views on the question of definition as stated in the paragraph which has been challenged by some members of the committee.

"Mr. Brown: I want to say a few words on that. As Mr. Hughes stated at the outset, any definition in any case including this one is subject to whatever exemptions may already exist in the act, and insofar as there is an exemption in 13(a)(6) of the act for agriculture, why of course any definition of this industry would be subject to that exemption.

"Now, that exemption, of course, exempts from minimum wages and overtime, activities which are deemed agriculture. Now, however the act does not go into great detail as to what activities are deemed agriculture and those which are not, and the Interpretative Bulletin No. 14 that was mentioned is merely the Division's opinion of what the courts will consider to be agriculture; and as a matter of fact there have been a few cases on that point, not very many, but some important ones, so that the thing to bear in mind is that there is no danger of fixing a minimum wage or anything that should not be fixed, should not be covered under this definition because the courts will eventually, and have already begun to indicate which activities on the farm and off the farm, are to be deemed agriculture. I don't think that we here in the Wage and Hour Division are prepared to go into any detail now, or could, even if we wanted to, go into detail to indicate what activities will be deemed agriculture and which will not. That is up to the courts.

"With respect to that particular point about the definition, namely the second paragraph, and that the production or any production covered under this definition should be deemed to begin with the loading of raw materials at the farm, why insofar as any of that loading will be held to be deemed part of farming and part of agriculture, of course that loading by a farmer or on a farm may be held by the courts to be agriculture and outside of the scope of this definition; but insofar as the courts may hold and might hold that certain loading by a mill of raw materials may be deemed to be not agriculture but merely part of grinding, why then it will be covered, but as I say that is something that will depend upon two things, the facts in each particular case and the courts will have to go into the facts to determine whether or not the loading is incidental to agriculture or incidental to milling and then upon those facts the courts will tell us whether it is to be exempt under 13(a)(6) or not.

"I think that is all I can tell you right now because it isn't for the Division to give a ruling or binding interpretation as to the definition." *Excerpts from Informal Hearing and Meeting of Industry Committee No. 50 for Sugar and Related Products Industry* held January 5, 1943, pp. 9-12, 12-14, 24-26.

3. *Exchange of letters with Mr. Paul E. Guillot, Paincourtville, Louisiana.*

a. *Letter from Mr. Guillot to the Wage and Hour Division.*

DUGAS & LEBLANC, LTD.
Manufacturers of
Westfield Sugars and Molasses

Paincourtville, La.
Sept. 29th, 1942

U. S. Department of Labor,
Wage and Hour Division,
Washington, D. C.

Gentlemen:

I am General Bookkeeper for the above firm, having been in their employment for the past twenty years. I am perfectly satisfied and fully desire to have my employer protected in every respect.

I would appreciate if you will assist me in giving me a definite ruling on the hour provision of the act with respect to our clerical force.

These people are Cane Farmers, Manufacturers of raw sugar and blackstrap molasses all moving to refineries within the state. Also a Narrow Gauge Railroad hauling our cane, and independent growers cane, but we bear the expense of the operation. They also operate in connection with their business, a retail store. The entire accounting record is kept and the work performed by the same office crew. Now, according to our interpretation of Bulletin No. 14, we arrive at this conclusion:

Farming-Agriculture	Exempt from hour provision
Processing Raw Sugar ..	Do.
Retail Store	Do.

Are we correct? Would the clerical help be also exempted?

My reasons for checking up on this and getting a specified ruling is that help is getting scarce, and it may be that we will have to put in longer hours, especially, during the harvesting and processing season.

Please advise promptly, and oblige,

Very truly yours,

/s/ Paul E. Guillot

b. *Letter from Mr. William B. Grogan for the Administrator to Mr. Guillot.*

165 West 46th Street
New York, New York

SOL:JHS:DS

November 26, 1942

Mr. Paul E. Guillot
Dugas & LeBlanc, Ltd.
Paincourtville, Louisiana

Dear Mr. Guillot:

This will reply to your letter of September 29 relating to the application of the Fair Labor Standards Act of 1938 to the operations of a sugar mill in which you are general bookkeeper. The original of your letter was sent directly to this Division; one copy was forwarded by Senator Allen J. Ellender of your State; and one copy was forwarded by Congressman James Domengeaux.

Both Senator Ellender and Congressman Domengeaux referred their copies of your letter to this Division for reply.

You state that your employers are cane farmers and manufacturers of raw sugar and blackstrap molasses, all moving to refineries within your State. They operate a narrow gauge railroad hauling both their own cane and the cane of independent growers. They also operate in connection with their business a retail store. The entire accounting record is kept by the same office crew. You conclude that the employees engaged in farming activities, processing of raw sugar and the retail store are exempt from the hour provisions of the Act. You ask if the clerical help would be exempt.

It appears that you already have a copy of Interpretative Bulletin No. 14. The first 13 paragraphs of that bulletin set forth the Administrator's interpretation of the scope of section 13(a)(6) of the Act. However, the recent decision of the United States Circuit Court of Appeals in *Calaf* v. *Gonzalez,* 127 F. (2d) 934 (C. C. A. 1) indicates that the mere fact that owners of sugar cane farms are also owners of a sugar mill and transportation facilities does not make transportation of the cane from the farms to the mill "incident to farming" and therefore exempt under Section 13(a)(6). Therefore, your employees engaged in transporting cane from the fields to the mill are not exempt under section 13(a)(6) of the Act. Except for the qualification just referred to, I believe that the first 13 paragraphs of bulletin 14 will enable you to determine which of your employer's employees are engaged in "agriculture" and therefore within the scope of the section 13(a)(6) exemption, and thus exempt from both the minimum wage and overtime provisions of the Act.

Section 13(a)(2) of the Act contains an exemption from both its minimum wage and overtime provisions for: "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Your employer operates a retail store in connection with its business. An establishment will not qualify for exemption under section 13(a)(2) unless more than 50 percent of its dollar volume of sales is in intrastate commerce. The exemption will also be defeated if its nonretail selling is substantial. For enforcement purposes, the Division will ordinarily consider the nonretail selling of an establishment to be substantial if the gross dollar volume of nonretail sales constitutes more than 25 percent of the

gross receipts of the establishment. If this store meets the two tests above and is open to and frequented by the general public, it is probably a retail establishment within the meaning of section 13(a)(2). If so, employees solely employed in the retail store are exempt from the wage and hour provisions of the Act in any weeks in which they are employed solely in the retail establishment.

As to employees outside the scope of the two exemptions referred to above, consideration should be given to the application of the section 7(c) exemption. This section exempts from the overtime, but not minimum wage, requirements of the Act, employees processing sugar cane into sugar (but not refined sugar) in any place of employment where their employer is so engaged. In the ordinary case, the making of blackstrap molasses comes within the scope of this exemption. To be within the scope of this exemption, an employee must be employed in the establishment where operations exempt under this section are performed. Truck drivers who carry raw materials to the establishment, or who transport away from the establishment goods upon which exempt operations have been performed, may be considered as working in the "place of employment" within the meaning of this section.

You state that the accounting work related to all of your employer's operations are performed by the same office crew. Bookkeeping and other clerical employees may, in proper circumstances, be exempt under sections 13(a)(6), 13(a)(2) or 7(c). As to all your employees, the doing in a workweek of any work exempt only from the overtime provisions of the Act will require compliance with the minimum wage provision for all hours worked in the week. And the doing of any work exempt from neither the minimum wage nor overtime requirements will require compliance with both provisions for all hours worked in that week.

The minimum wage now applicable in the sugar industry is 30 cents an hour. However, the Administrator has recently appointed an industry committee for the "Sugar and Related Products Industry." Under the provisions of the Fair Labor Standards Act, this industry committee may recommend to the Administrator for the sugar industry a minimum wage rate not to exceed 40 cents an hour. If such a recommendation for a rate in excess of 30 cents is approved by the Administrator, it will become effective on the date prescribed by him. If the Administator approves such a wage order for the sugar industry, the usual public notice will be given in advance of its effective date.

If you have further questions, information may be obtained from our New Orleans, Louisiana office located at 916 Union Building in that city.

Very truly yours,

/s/ William B. Grogan
Acting for Administrator
L. Metcalfe Walling

4. *Letter from the Deputy Administrator to Mr. James Marshall, Director, Sugar Branch, Production and Marketing Administration, U. S. Department of Agriculture.*

SOL:EGT:MFS (Oct 9 1948)

Mr. James Marshall
Director, Sugar Branch
Production and Marketing Administration
U. S. Department of Agriculture
South Agriculture Building
Washington, D. C.

Attention: Mr. Harry Simpson

Dear Mr. Marshall:

This is in reply to Mr. Simpson's telephone request of September 25, 1946, to Mr. Robert G. Grenewald, for information concerning the status under the Fair Labor Standards Act of truck drivers in Puerto Rico who haul sugarcane from farms to sugar factories.

I understand the A. A. A. office in Puerto Rico is holding a hearing in San Juan, Puerto Rico, on October 15, 1946, for the purpose of determining the wages of employees under the Sugar Act. I also understand that it is not the purpose of this hearing to cover truck drivers who are subject to a wage order under the Fair Labor Standards Act, but that where truck drivers are not so covered, an attempt will be made to establish a minimum wage for their employment. For the guidance of the A. A. A. office in Puerto Rico you desire a general statement concerning the type of truck drivers covered by the Fair Labor Standards Act and the wage orders to which they are subject when hauling sugarcane from farm to sugar mill or centrale.

As you know, the Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including occupations or processes necessary to such production. Employees so engaged must be paid at least the applicable mini-

mum rates provided in the Act (which may not exceed 40 cents per hour) and not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless specifically exempted from one or both of these requirements by some provision of the Act. While a minimum rate of 40 cents per hour has been generally applicable in all industries on the continent since July 1944, minimum rates applicable in Puerto Rico under sections 5(c) and 6(c) of the Act vary in the different industries.

Truck drivers who are engaged in hauling sugarcane from a farm to a centrale for production into sugar or other commodities which goods or any unsegregated part thereof are expected to be shipped in interstate commerce directly or indirectly, in the same form or after further processing, are generally covered by the Act. On the other hand, where the sugarcane is being processed for purely local consumption and is not expected to leave Puerto Rico, either as sugar or as an ingredient of some other product, truck drivers engaged in transporting the cane from farm to centrale would not be covered by the Act.

An employee who is covered by the Act may be exempt, however, from its minimum wage and overtime provisions, as indicated above. Thus, section 13(a)(6) exempts from the Act's minimum wage and overtime requirements employees engaged in agriculture, which, as defined in section 3(f), includes, among other things, "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including, * * * delivery to storage or to market or to carriers for transportation to market." Truck drivers transporting cane on a farm as an incident to the farming operations on that farm would, of course, be exempt. However, since the truck drivers deliver the cane to a mill, I assume that this transportation involves working off the farm, in which case the transportation of the sugarcane would be exempt under section 13(a)(6) only if performed by employees of the farmer, as an incident to the farming operations of the farmer. In the ordinary case, an employee of a farmer who is employed by the farmer to haul the farmer's own cane to a mill or factory would be exempt under section 13(a)(6). Employees engaged in such transportation are exempt from the Act's minimum wage and overtime provisions and hence are not subject to any wage order issued under the Act.

There are situations in Puerto Rico, however, where the farm and centrale are under common ownership. The mere fact that the owner of the sugar centrale also owns a farm would not necessarily mean that transportation from the

farm to the mill is "incident to farming" and therefore exempt under section 13(a)(6). In such a situation, it becomes a question of fact whether the truckers are employed by the plantation in work incidental to farming operations, so that they would be exempt under section 13(a)(6), or whether they are employed by the centrale in work incidental to milling operations which would not be exempt. In deciding this question the Divisions have adopted the tests used by the court in *Calaf Collazo* v. *Gonzalez* 127 F. (2d) 934. Thus, where the employees are on the farm pay roll, report to the farm for instructions daily and at the end of the day, are generally supervised from the farm, perform agricultural work on the farm, and where the trucks are stored and maintained on the farm—these are factors indicating that the employees are performing work which is an incident to the farming operations. On the other hand, where the employees are on the mill pay roll, are supervised from and report to the mill, and perform other work at the mill, these factors would indicate that the work of the employees is incidental to the milling operations.

Where truck drivers are employed by sugar factories or centrales, as distinguished from employment by the farmer, to transport cane from farm to factory, their work, under the decisions of the courts and the interpretations of the Divisions, is incidental to milling and not farming operations and is, consequently, not exempt under section 13(a)(6). Also, where a farmer transports another farmer's cane from field to centrale, such transportation operations are not within the 13(a)(6) exemption. Neither would transportation to the centrale be exempt under section 13(a)(6) if performed by independent contractors. The work of all these truckers, if within the coverage of the Act, would be subject to applicable wage orders.

The question of which wage order applies to truck drivers subject to the Act's minimum wage provisions and who are engaged in hauling cane from field to factory would depend upon the facts in each particular situation. Without a complete knowledge of such facts I cannot advise you spesifically on the point. In general, however, when the transportation is performed by a trucking firm or company which holds itself out to the general public to engage in the transportation for compensation of property in commerce or of property necessary to the production of goods for commerce, the employees would be subject to the wage order for Railroad and Property Carrier Industry, *provided* that: (a) the company is not directly or indirectly owned or controlled by a company primarily engaged in manufacturing or other non-transportation activity, *and* (b) does not per-

form any transportation functions for such company. The wage rate under this wage order is 20 cents an hour. Where trucking employees of a centrale transport cane from field to mill, such activities are covered by the wage order for the Sugar Manufacturing Industry, which prescribes a minimum wage rate of 35 cents an hour. Likewise, employees of a trucking firm owned or controlled by a centrale and which is primarily engaged in hauling for the centrale would also be subject to the Sugar Manufacturing Industry wage order. Where an independent trucking firm does not haul for the general public but intentionally limits its services to a few centrales, refusing orders from other members of the public who might require its services, its operations would generally be covered by the wage order for the Communications, Utilities and Miscellaneous transportation Industries, which prescribes a wage rate of 40 cents an hour.

I trust that this information will be of assistance to you. However, if the A. A. A. office in Puerto Rico needs any further information concerning this matter, I would suggest that it communicate with Mr. Kretzinger of the Department's Puerto Rican office, who is fully informed on all the problems involved.

Very truly yours,

THACHER WINSLOW
Deputy Administrator